

1 Rule 1.6. Confidentiality of Information.

2 (a) A lawyer shall not reveal information relating to the representation of a client  
3 ~~except as stated in paragraph (b), unless the client consents after consultation~~ unless  
4 the client gives informed consent, the disclosure is impliedly authorized in order to carry  
5 out the representation or the disclosure is permitted by paragraph (b).

6 (b) A lawyer may reveal ~~such~~ information relating to the representation of a client to  
7 the extent the lawyer reasonably believes necessary:

8 ~~(b)(1) To prevent the client from committing a criminal or fraudulent act that the~~  
9 ~~lawyer believes is likely to result in~~ to prevent reasonably certain death or substantial  
10 bodily harm, ~~or substantial injury to the financial interest or property of another;~~

11 ~~(b)(2) to prevent the client from committing a crime or fraud that is reasonably~~  
12 ~~certain to result in substantial injury to the financial interest or property of another and in~~  
13 ~~furtherance of which the client has used the lawyer's services;~~

14 ~~(b)(3) To to prevent, mitigate or rectify the consequences of a client's criminal or~~  
15 ~~fraudulent act in the commission of which the lawyer's services had been used~~  
16 ~~substantial injury to the financial interests or property of another that is reasonably~~  
17 ~~certain to result or has resulted from the client's commission of a crime or fraud and in~~  
18 ~~furtherance of which the client has used the lawyer's services;~~

19 ~~(b)(3)-(4) to secure legal advice about the lawyer's compliance with these Rules;~~

20 ~~(b)(5) To to~~ establish a claim or defense on behalf of the lawyer in a controversy  
21 between the lawyer and the client ~~or,~~ to establish a defense to a criminal charge or civil  
22 claim against the lawyer based upon conduct in which the client was involved, or to  
23 respond to allegations in any proceeding concerning the lawyer's representation of the  
24 client; or

25 ~~(b)(6)(4) To to~~ comply with ~~the Rules of Professional Conduct or other law~~ the law or  
26 court order or when necessary to comply with these Rules.

27 (c) For purposes of this rule, Representation of a client includes counseling a  
28 lawyer~~(s)~~ about the need for or availability of treatment for substance abuse or  
29 psychological or emotional problems by members of the Utah State Bar serving on the  
30 Lawyers Helping Lawyers Committee.

31 Comment

~~[1] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality. This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.~~

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect in two by related bodies of law: the attorney-client privilege in the law of evidence, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege applies and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not merely only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

#### Authorized Disclosure

[5] ~~A lawyer may disclose information~~ Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized ~~to make disclosures~~ about a client when ~~necessary in the proper representation of the client. In litigation appropriate in carrying out the representation.~~ In some situations, for example, a lawyer may ~~disclose information by admitting~~ be impliedly authorized to admit a fact that cannot properly be disputed, ~~or in negotiation by making~~ or to make a disclosure that facilitates a satisfactory conclusion to the matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

#### Disclosure Adverse to Client

~~The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm to another person. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission of deliberately wrongful acts, the public is better protected if full disclosure by the client is encouraged than if it is inhibited.~~

93       ~~Generally speaking, information relating to the representation must be kept~~  
94 ~~confidential, as stated in paragraph (a). However, where the client is or has been~~  
95 ~~engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is~~  
96 ~~involved, the principle of confidentiality may have to yield, depending on the lawyer's~~  
97 ~~knowledge about and relationship to the conduct in question and the seriousness of that~~  
98 ~~conduct. Several situations must be distinguished.~~

99       ~~First, the lawyer may not counsel or assist a client in conduct that is criminal or~~  
100 ~~fraudulent. See Rule 1.2(d). As noted in the Comment to that Rule, there can be~~  
101 ~~situations where the lawyer may have to reveal information relating to the~~  
102 ~~representation in order to avoid assisting a client's criminal or fraudulent conduct.~~  
103 ~~Paragraph 1.6(b)(4) permits doing so. Similarly, a lawyer has a duty under Rule~~  
104 ~~3.3(a)(4) not to use false or fabricated evidence. This duty is essentially a special~~  
105 ~~instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or~~  
106 ~~fraudulent conduct. Rule 1.6(b)(4) permits revealing information to the extent necessary~~  
107 ~~to comply with Rule 3.3(a). The same is true of compliance with Rule 4.1 concerning~~  
108 ~~truthfulness of a lawyer's own representations.~~

109       ~~Second, the lawyer may have been innocently involved in past conduct by the client~~  
110 ~~that was criminal or fraudulent. In such a situation, the lawyer has not violated Rule~~  
111 ~~1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing~~  
112 ~~that the conduct is of that character. Even if the involvement was innocent, however, the~~  
113 ~~fact remains that the lawyer's professional services were made the instrument of the~~  
114 ~~client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to~~  
115 ~~rectify the consequences of such conduct and has the professional right, although not a~~  
116 ~~professional duty, to rectify the situation. Exercising that right may require revealing~~  
117 ~~information relating to the representation. Paragraph (b)(2) gives the lawyer~~  
118 ~~professional discretion to reveal such information to the extent necessary to accomplish~~  
119 ~~rectification.~~

120       ~~Third, the lawyer may learn that a client intends prospective conduct that is criminal~~  
121 ~~or fraudulent. Inaction by the lawyer is not a violation of Rule 1.2(d), except in the~~  
122 ~~limited circumstances where failure to act constitutes assisting the client. See Comment~~  
123 ~~to Rule 1.2(d). However, the lawyer's knowledge of the client's purpose may enable the~~

lawyer to prevent commission of the prospective crime or fraud. If the prospective crime or fraud is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, the lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent substantial harm likely to result from a client's criminal or fraudulent act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by a client. However, it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when the client intends such an act, at risk of disciplinary liability if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.

The lawyer's exercise of discretion requires consideration of such factors as the magnitude, proximity and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule. The term "another" in paragraph (b)(1) includes a person, organization and government.

Paragraph (b)(2) does not apply where a lawyer is employed after a crime of fraud has been committed to represent the client in matters ensuing therefrom.

#### Dispute Concerning Lawyer's Conduct

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending himself.

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information

relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal or professional, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is not prevented by the rule of confidentiality from proving the services rendered in an action to collect it.

#### ~~Disclosures Otherwise Required or Authorized~~

~~The attorney-client privilege is defined differently in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable.~~

~~The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 1.13, 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.~~

#### ~~Use of Information~~

~~A lawyer may not make use of information relating to the representation in a manner disadvantageous to the client. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.~~

The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable



247 action to obviate the need for disclosure. In any case, a disclosure adverse to the  
248 client's interest should be no greater than the lawyer reasonably believes necessary to  
249 accomplish the purpose. If the disclosure will be made in connection with a judicial  
250 proceeding, the disclosure should be made in a manner that limits access to the  
251 information to the tribunal or other persons having a need to know it and appropriate  
252 protective orders or other arrangements should be sought by the lawyer to the fullest  
253 extent practicable.

254 [15] Paragraph (b) permits but does not require the disclosure of information relating  
255 to a client's representation to accomplish the purposes specified in paragraphs (b)(1)  
256 through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may  
257 consider such factors as the nature of the lawyer's relationship with the client and with  
258 those who might be injured by the client, the lawyer's own involvement in the  
259 transaction and factors that may extenuate the conduct in question. A lawyer's decision  
260 not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may  
261 be required, however, by other rules. Some rules require disclosure only if such  
262 disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3.  
263 Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of  
264 whether such disclosure is permitted by this Rule. See Rule 3.3(c).

265 Acting Competently to Preserve Confidentiality

266 [16] A lawyer must act competently to safeguard information relating to the  
267 representation of a client against inadvertent or unauthorized disclosure by the lawyer  
268 or other persons who are participating in the representation of the client or who are  
269 subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

270 [17] When transmitting a communication that includes information relating to the  
271 representation of a client, the lawyer must take reasonable precautions to prevent the  
272 information from coming into the hands of unintended recipients. This duty, however,  
273 does not require that the lawyer use special security measures if the method of  
274 communication affords a reasonable expectation of privacy. Special circumstances,  
275 however, may warrant special precautions. Factors to be considered in determining the  
276 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of  
277 the information and the extent to which the privacy of the communication is protected by

law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

[19] Paragraph (d) is an addition to ABA Model Rule 1.6 and provides for confidentiality of information between lawyers providing assistance to other lawyers under the Utah State Bar program, Lawyers Helping Lawyers.